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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

MOTION TO DISMISS WRIT OF CERTIORARI ON GROUND OF MOOTNESS

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The Solicitor General, on behalf of the Price Administrator, respondent herein, suggests that this cause has become moot, and accordingly moves, under Rule 7 (3), that the writ of certiorari heretofore granted be dismissed.

The petition for certiorari challenged a decision by the United States Emergency Court of Appeals that it lacked authority, in this proceeding, to determine whether Section 1347.14 (d) of Maximum Price Regulation No. 30, issued by the Price Administrator, was valid or invalid during the period July 16 through September 11, 1943 (*Thomas Paper Stock Co. et al.* v. *Bowles*, 148 F. 2d 831 (E. C. A. No. 159)). The petition was granted by this Court on June 4, 1945. There-

after, on October 5, 1945, the Emergency Court of Appeals, in another proceeding hereinafter described brought by petitioners, decided the issues of validity which that court had declined to consider in the present case. For the reasons more fully set out below, it is submitted that the subsequent decision by the Emergency Court of Appeals renders moot the request for relief in the present case in this Court.

The present proceeding originated in the filing of a protest by petitioners, with the Price Administrator, under Section 203 (a) of the Emergency Price Control Act. Upon the denial of the protest, a complaint was filed with the United States Emergency Court of Appeals under Section 204 (a) of the Act. Two objections were raised against the validity of the regulation. The court below held the first of these to be without merit (R. 61–65). The court declined to consider the second objection on the merits for the reason that the alleged defect had been cured on September 11, 1943, before the protest had been filed. Certiorari was sought only as to the latter branch of the decision of the court below. The decision rendered by the Emergency Court of Appeals on October 5, 1945, was entered in a case begun on complaint in that court filed under Section 204 (e) (1), pursuant to leave by the District Court for the Northern District of Illinois in a criminal proceeding against petitioners under Section 205 (b) of the Act. That the issues decided

on the merits in the later case are the same as those which petitioners unsuccessfully sought to have decided in the present case is made clear by the opinion of the court below in the later proceeding (No. 232 in that court):[1]

> This complaint, which has been filed under Section 204 (e) (1) of the Emergency Price Control Act with leave of the United States District Court for the Northern District of Illinois, properly brings to us for consideration the objection of the complainants to Section 1347.14 (d) of Maximum Price Regulation No. 30, Wastepaper, which we held we had no power to consider in connection with their prior complaint filed under Section 204 (a). See *Thomas Paper Stock Co.* v. *Bowles,* 148 F. 2d 831 (1945).

Since petitioners have thus secured the relief which their petition for certiorari sought—a determination by the court below of the merits of certain objections to the pertinent price regulation—the present proceeding has lost its vitality and presents only a moot issue. Cf. *Lewis Publishing Company* v. *Wyman,* 228 U. S. 610; *Brownlow* v. *Schwartz,* 261 U. S. 216; *Smith* v. *Illinois Bell Telephone Company,* 270 U. S. 587, 588–589; *Hudson & Manhattan Railroad Company* v. *Jersey City,* 321 U. S. 755.

[1] Copies of the opinion are being lodged with the clerk. A chronology of the two proceedings is set forth in the Appendix, *infra.*

Two possible arguments might be advanced against the conclusion that no useful purpose could be served by a judgment of this Court in the present case. One is that there may be a latent jurisdictional defect in the proceeding just concluded in the Emergency Court of Appeals, which would lead this Court, if certiorari were sought and granted in that case, to decline to review the decision on the merits. Petitioners have referred to this possibility in footnote 2 (a) to their brief (p. 14):

> The question still remains whether the Emergency Court of Appeals has jurisdiction of the complaint filed pursuant to leave granted under Section 204 (e) (1). If it had jurisdiction to review the denial of the protest in the case here under review, then it would seem that the complaint filed under Section 204 (e) (1) ought not to be considered as properly filed.

It is submitted that the conclusion drawn in the second sentence of this quotation from the petitioner's brief is unwarranted. The District Court, in granting leave to file a complaint directly with the Emergency Court of Appeals, found that the objection to the regulation was "made in good faith" and that there was "reasonable and substantial excuse for the defendants' [petitioners'] failure to present such objection in a protest filed in accordance with section 203 (a)" of the Emergency Price Control Act. See Sec. 204 (e)

(1), which also provides that "Upon the filing of a complaint pursuant to * * * such leave, the Emergency Court of Appeals shall have jurisdiction to * * * set aside * * * the provision of the regulation * * * complained of or to dismiss the complaint." The necessary findings having been made, the jurisdiction of the Emergency Court of Appeals seems clearly established.

Moreover, even if it be assumed that the Emergency Court of Appeals erred in holding, in the present case, that the protest had not been timely filed, it seems clear that the filing of a protest after institution of the enforcement proceeding would not require the denial of an application for leave to file a special complaint. Under Sec. 204 (e) (2) petitioners would not be entitled to a stay of the criminal enforcement proceeding because of the pendency of the protest itself or any judicial proceeding arising therefrom, since the protest was not filed "prior to the institution of the" criminal proceeding (Sec. 204 (e) (2) (ii)). Therefore, had petitioners not filed a direct complaint under Sec. 204 (e) (1), the trial of the criminal enforcement action could not have been stayed.[2] It is possible, and under the facts here

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[2] "* * * Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; * * *" (last sentence of Section 204 (e)).

presented, highly probable, that in the absence of such a stay the criminal proceeding would have gone to judgment before there could be a final determination of the validity of the regulation in the present proceeding. Thus, in the absence of the direct complaint under Sec. 204 (e) (1), if petitioners were convicted in the criminal proceeding, they could have no relief against the sentence imposed. Therefore, even if it be assumed that the protest was "properly filed by the defendant under section 203," it would not follow that the Emergency Court of Appeals was without jurisdiction over the complaint in Case No. 232.

The second possible argument against mootness is perhaps foreshadowed in a letter to this Court, dated May 29, 1945, in which petitioners' counsel stated:

> We also desire to point out that the granting of leave under Section 204 (e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

We submit that this conclusion is also unwarranted. Under Section 204 (e) (2) (iii) of the Act, a defendant in an enforcement action under Section 205 is entitled to a stay "during the pendency of any judicial proceeding instituted by the defendant under * * * paragraph (1) of this subsection * * * and until the expiration of the time allowed in this section for the

taking of further proceedings, with respect thereto." Thus, if the civil enforcement action had gone to judgment prior to a final determination of the merits in Case No. 232 in the Emergency Court of Appeals, petitioners would be entitled to a stay of execution until final determination of that case by the court below, or by this Court on review.

It follows, in our view, that a decision in the proceeding which has now reached judgment on the merits in the Emergency Court of Appeals would have afforded petitioners, if they were successful therein, all the relief which they might have obtained by a decision in the present proceeding. Since they have in fact secured a decision, albeit unfavorable on the merits, they have received the only relief which could be afforded them by this Court on the writ of certiorari, and it is therefore respectfully submitted that the writ should be dismissed on the ground that the cause has become moot. Cf. *St. Pierre* v. *United States*, 319 U. S. 41.

J. HOWARD MCGRATH,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

NOVEMBER 1945.

APPENDIX

The following is a chronological statement of the relevant facts:

December 17, 1943—Criminal proceeding under Sec. 205 (b) instituted against petitioners in the United States District Court for the Northern District of Illinois, alleging violations between July 16 and September 11, 1943.

June 15, 1944—Protest filed with the Administrator.

June 29, 1944—Enforcement action under Sec. 205 (a) and (e) instituted against petitioners in the United States District Court for the Northern District of Illinois, alleging violations between July 16, and September 11, 1943.

July 29, 1944—Protest denied by the Price Administrator.

August 26, 1944—Complaint filed in the Emergency Court of Appeals under Sec. 204 (a) seeking review of denial of the protest (E. C. A. No. 159).

March 27, 1945—Complaint in Case No. 159 dismissed by the Emergency Court of Appeals.

May 10, 1945—Leave to file a complaint directly with the Emergency Court of Appeals, under Sec. 204 (e) (1), granted by the court in the criminal action under Sec. 205 (b), and the criminal action stayed pending completion of the complaint proceeding.

June 4, 1945—Writ of certiorari to Emergency Court of Appeals in Case No. 159 granted by this Court.

June 8, 1945—Complaint filed by petitioners with the Emergency Court of Appeals under Sec. 204 (e) (1) (E. C. A. No. 232).

October 5, 1945—Complaint dismissed by the Emergency Court of Appeals in Case No. 232 on the merits.

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